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No. 86-1758

In The
Supreme Court of the United States
October Term, 1986

WATERWAYS ASSOCIATION OF PITTSBURGH,
Appellant,

v.

HERSCHEL H. ROSE, III, STATE TAX COMMISSIONER OF WEST VIRGINIA,
Appellee.

On Appeal from the Circuit Court of Kanawha County of West Virginia

MOTION TO DISMISS OR AFFIRM

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June 1987

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QUESTIONS PRESENTED

The appellee respectfully disagrees with the appellant's presentation of the questions raised in its Jurisdictional Statement and feels that the following more fairly represents the questions for review:

1. Whether the appellant has the standing necessary to maintain this action and whether there exists a case or controversy sufficient to invoke the jurisdiction of the Court.

2. Whether the issue of preemption having not been raised in the proceedings below may be raised for the first time on appeal. If so, then whether the federal government has preempted the tax imposed by West Virginia Code § 11-15A-13.

3. Whether the properly apportioned, nondiscriminatory complementary gasoline or special fuel use tax imposed by West Virginia Code § 11-15A-13 is an unconstitutional burden on interstate commerce in violation of the Commerce Clause and the Due Process Clause of the United States Constitution.

4. Whether the tax imposed by West Virginia Code § 11-15A-13 constitutes a duty of tonnage, prohibited by Article I, Section 10, Clause 3, of the United States Constitution.

5. Whether the tax imposed by West Virginia Code § 11-15A-13 is prohibited under the terms of the Northwest Ordinance of 1787 and the Virginia Compact of 1789.

PARTIES TO THE PROCEEDING

The appellant, Waterways Association of Pittsburgh, a Pennsylvania corporation, is a nonprofit membership association (J.S. App. C). Appellant's members were not made parties to the proceeding by class action or otherwise. Rule 10 of the West Virginia Rules of Civil Procedure requires that "[i]n the complaint the title to the action shall include the name of all the parties * * *." This suit was commenced solely in the name of the appellant, an incorporated association. *See* Complaint for Declaratory Relief, Appendix B, *infra*. The appellee, Herschel H. Rose, III, is the former Tax Commissioner of the State of West Virginia. The current State Tax Commissioner and successor to Herschel H. Rose, III, is Michael E. Caryl.

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WATERWAYS ASSOCIATION OF PITTSBURGH,

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v.

HERSCHEL H. ROSE, III, STATE TAX COMMISSIONER OF WEST VIRGINIA,

Appellee.

On Appeal from the Circuit Court of Kanawha County of West Virginia

MOTION TO DISMISS OR AFFIRM

Appellee, Tax Commissioner of the State of West Virginia, hereby moves, pursuant to Rule 16 of the Rules of this Court, to dismiss the appeal in this case or to affirm the judgment below on the grounds that the appellant lacks standing, the matter does not present a justiciable controversy, that the appeal does not present substantial federal questions, as well as other grounds which this appellee will present herein, all of which establish that the Court should not set this case for argument.

OPINION BELOW

A declaratory judgment action was commenced by the appellant in the Circuit Court of Kanawha County, West Virginia, seeking a determination as to the constitutionality of the West Virginia consumer sales and service tax and use tax on gasoline and motor fuels and also seeking refund of said taxes for certain of its members. On April 18, 1986, the Circuit Court of Kanawha County, held the challenged taxes valid between the date of their enactment and June 30, 1985, but invalid after June 30, 1985 (J.S. App. C). The opinion of the Circuit Court of Kanawha County is not officially reported.

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JURISDICTION

The West Virginia Supreme Court of Appeals denied appellant's petition for appeal of final order of the Circuit Court of Kanawha County, West Virginia. Appellant filed a notice of appeal (J.S. App. A, 1a) with the West Virginia Supreme Court of Appeals and Circuit Court of Kanawha County, West Virginia, on April 28, 1987. The jurisdictional statement was timely filed in this Court. The asserted jurisdiction of this Court rests upon 28 U.S.C. § 1257(2). As will be addressed herein, the pleadings and proof fail to establish that the appellant has the necessary standing to invoke the jurisdiction of this Court and further no "case" or "controversy" susceptible of judicial determination is presented.

—o—

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of Article I, Section 8, Clause 3; Article I, Section 10, Clause 3; and Article VI, Clause 2, of the United States Constitution and the Fourteenth Amendment thereto, of 26 U.S.C. § 4042 (1982), of the Northwest Ordinance of 1787 and Virginia Compact of 1789, and W. Va. Code § 11-15A-13 are set forth in the Jurisdictional Statement, Appendices D and E.

Other relevant constitutional and statutory provisions involved in this appeal are set forth in Appendix A, *infra*.

STATEMENT OF THE CASE

1. *The Enactment of W. Va. Code* § 11-15A-13. On February 13, 1983, the West Virginia Legislature passed House Bill 1657, amending Chapter 11, Articles 15 and 15A, of the West Virginia Code of 1931, as amended (hereinafter referred to as "Code"). House Bill 1657 became effective April 1, 1983, and provides for imposition of a tax on the sale, delivery, use or consumption in West Virginia of gasoline or special fuel.

Code 11-15-18 provides for a consumers sales and service tax on all sales of gasoline or special fuel by distributors or importers within the State of West Virginia unless the sale is to another distributor for resale (J.S. App. D, 35a). Code 11-15A-13(a) imposes a complementary use tax on the "use or consumption in this State of gasoline or special fuel purchased outside this State" and on all "gasoline or special fuel delivered within this State to consumers or users" at the equivalent rate of the consumers sales tax on gasoline or special fuel.

The computation of the fuel use tax allows the taxpayer to deduct the total tax paid under consumers fuel tax for use in the operation of the carrier in determining the amount of tax due. Code 11-15A-13(d) (J.S. App. D, 33a). Additionally, the taxpayer is allowed a reciprocal credit equal to the amount of sales or use tax paid in another state on fuel used or consumed in West Virginia.[1]

[1]Prior to July 1, 1985, a reciprocal use tax credit was provided equal to the combined amount or amounts of legally imposed sales or use taxes paid by the purchaser on tangible personal property to another state or another subdivision thereof. W. Va. Code § 11-10A-8(a) (1983). This credit was repealed when Chapter 11, Article 10A, of the West Virginia Code, the West Virginia Multistate Tax Compact, was repealed effective June 30, 1985. The West Virginia Legislature, during the Second

(Continued on following page)

The fuel use tax not only applies to commercial watercraft but also to all motor carriers which includes buses, tractor trucks, trucks with more than two axles, aircraft, or locomotive transporting passengers or freight in or through West Virginia. Code 11-15-18(c)(6) (J.S. App. D, 36a-37a). Further, the measure of the tax is "that proportion of the total amount of gasoline and special fuel used in any motor carrier's operations within and without this State, that the total number of miles traveled within this State bears to the total miles traveled within and without this State." Code 11-15A-13(d)(1) (J.S. App. D, 33a). Thus, the West Virginia tax is apportioned exactly to the miles traveled within this state.

Additionally, in construing the fuel use tax, a taxpayer, when reporting, shall not construe it as "taxing any gasoline or special fuel which the State is prohibited from taxing under the constitution of this State or the constitution or laws of the United States." Code 11-15A-13(h) (J.S. App. D, 35a).

2. *The Course of Litigation Below.* Waterways Association of Pittsburgh, the sole plaintiff below, filed a complaint for declaratory relief pursuant to the provisions of W. Va. Code § 55-13-1 *et seq.* and the provisions of Rule 57 of the West Virginia Rules of Civil Procedure in the Circuit Court of Kanawha County, West Virginia, on or about July 9, 1984. *See* Appendix B, *infra.*

The declaratory judgment action sought to invalidate Code 11-15A-13, which imposes a use tax on gasoline or

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Extraordinary Session of the 1986 Legislative Session, in response to the circuit court's ruling in this case, enacted Enrolled Committee Substitute for Senate Bill No. 1 (hereinafter "Senate Bill No. 1") (J.S. App. E, 40a). This remedial legislation amended and reenacted Code 11-15A-13, and made it retroactive to July 1, 1985. Senate Bill No. 1 further enacted Code 11-15A-10a which authorizes a credit for sales taxes paid in another state against West Virginia fuel use taxes imposed after June 30, 1985 (J.S. App. E, 50a).

special fuel consumed in the State on the grounds that said statute violates certain provisions of the Northwest Ordinance and the Virginia Compact, the Constitution of the State of West Virginia, and the Commerce, Due Process and Duty of Tonnage Clauses of the United States Constitution.

On or about August 10, 1984, Herschel H. Rose, III, then Tax Commissioner of the State of West Virginia, filed his answer in response to the complaint for declaratory relief denying that the tax is invalid on the grounds set forth in appellant's complaint. In addition, the Tax Commissioner responded that the appellant failed to state a claim upon which relief can be granted and that Code 11-10-14 contains the exclusive remedy for obtaining any state tax refund, whereupon the Tax Commissioner asked that the action be dismissed. *See* Appendix C, *infra*.

The Kanawha County Circuit Court, by Judge Workman, issued an opinion and final order on April 18, 1986. Without addressing the appellee's claims that the action failed to state a claim upon which relief can be granted and that an action to obtain a refund for state taxes cannot be maintained in a declaratory judgment proceeding, the lower court ruled that the West Virginia fuel use tax violates neither the Northwest Ordinance nor the Virginia Compact; it is not a duty of tonnage prohibited by Article I, Section 10, Clause 3, of the United States Constitution; does not violate the Commerce Clause, Article I, Section 8, Clause 3, of the United States Constitution; and that the statute is constitutional and valid in every respect between the date of its enactment and June 30, 1985. The lower court upheld the gasoline sales tax contained in Code 11-15-18. The appellant does not contest the sales tax on gasoline or special fuel. Appellant seeks review of the circuit court's decision and final order upholding the validity of the West Virginia fuel use tax (J.S. 5). The lower court further held that Code 11-15A-13 is unconstitutional and without effect after June 30, 1985, as it discriminates against interstate commerce and, therefore, violates Ar-

ticle I, Section 8, Clause 3, of the United States Constitution because on July 1, 1985, the general use tax credit for sales tax paid in other states was repealed. *See* Note 1, *supra.*

Both parties simultaneously filed petitions for appeal of the final order of the Circuit Court of Kanawha County, West Virginia, to the West Virginia Supreme Court of Appeals. The appellee, West Virginia State Tax Commissioner, argued, *inter alia,* that no actual and justiciable controversy exists between the parties and renewed his claim that the lower court erred in allowing an action for a refund of state taxes in a declaratory judgment action. The West Virginia Supreme Court of Appeals refused to grant both the appellee's and appellant's petitions for appeal on February 3, 1987. Subsequently, the appellant appealed the ruling of the Circuit Court of Kanawha County, West Virginia, to this Court.

3. *Statement of the Facts.* Appellant, a Pennsylvania corporation, brought this declaratory judgment action seeking to have Code 11-15-18 and Code 11-15A-13 declared invalid and unenforceable and seeking refunds for its unnamed "members." The parties stipulated that some of appellant's members are motor carriers within the meaning of Code 11-15-18(c)(6) who are engaged in the business of transporting products by barge or watercraft on navigable rivers within the State of West Virginia and other navigable rivers outside the state. At least 30 percent of the mileage within West Virginia of certain members is for one-point and/or two-point traffic. Specific facts, including the names of the individual members and their various contacts with West Virginia, are not in the record. However, it is apparent that certain members are engaged in other transportation activities in West Virginia. "In those instances where goods or employees are transported to or from barge loading points [within West Virginia], fuel use tax is paid on the fuel consumed in that separate transaction" (J.S. 19). The record fails to disclose the circum-

stances under which the members pay the fuel use tax, *i.e.*, delivery, storage, or use.

Appellant does not pay tax in West Virginia and is not engaged in the river transportation business in this state. However, some of appellant's members voluntarily report the tax on fuel purchased outside of West Virginia and delivered, used or consumed in this state. Other of appellant's members do not pay the tax in question because they do not do business in West Virginia (J.S. App. C, 8a). None of appellant's members has ever sought to apply for the use tax credit (J.S. App. C, 9a).

Appellant misconstrues the fuel use tax in its statement of facts when it declares that the "statute requires Appellant's members to pay taxes on the consumption of fuel in West Virginia even though they have no contact with West Virginia other than navigating in West Virginia waters" (J.S. 7). The fuel use tax is imposed on the furnishing or delivering within this state to consumers or users and on the use or consumption by carriers within this state of gasoline or special fuel purchased outside the state to the extent sales or use tax has not been paid in this state or in another state, provided that such imposition is not prohibited under the West Virginia Constitution, the United States Constitution, or federal laws.

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ARGUMENT

I. NO CASE OR CONTROVERSY IS PRESENTED WITHIN THE APPELLATE JURISDICTION OF THIS COURT AND THE APPELLANT HAS FAILED TO DEMONSTRATE THAT IT HAS STANDING TO ASSERT THE RIGHTS OF NON-PARTIES TO THIS PROCEEDING.

This controversy is not between the West Virginia State Tax Commissioner and a taxpayer aggrieved by an assessment of tax or a denial of a properly filed refund claim. Rather, it involves the appellant, a Pennsylvania incorporated association that does not pay West Virginia taxes, seeking both a declaratory judgment on the consti-

tutionality of the West Virginia fuel use tax and unspecified refunds on behalf of certain undisclosed members. The appellant is essentially seeking an advisory opinion or abstract determination advising what the law would be on an uncertain or hypothetical set of facts. *See* Appendix B, *infra.*

The judicial power with which this Court is vested by Article III, Section 1, of the United States Constitution extends by Article III, Section 2, only to "cases" and "controversies." If no "case" or "controversy" is presented for decision, this Court is without power to review the decree of the court below. *Muskrat v. United States,* 219 U.S. 346 (1911). For the reasons set forth below, this matter does not present a case or controversy within the appellate jurisdiction of this Court.

In making a jurisdictional determination, this Court looks to "the nature of the proceeding which the statute authorizes, and the effect of the judgment rendered upon the rights which appellant asserts." *Nashville, Chattanooga & St. Louis Railway v. Wallace,* 288 U.S. 249, 259 (1933).

A state declaratory judgment may be reviewed in this Court provided that the matter retains the essentials of an adversary proceeding involving a real controversy which is finally determined by the judgment of the state court. *Poe v. Ullman,* 367 U.S. 497 (1961), *reh. den.,* 368 U.S. 869 (1961); *Nashville, supra.* The test is whether "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil Co.,* 312 U.S. 270, 273 (1941).

The West Virginia Uniform Declaratory Judgments Act empowers "[a]ny person" whose "rights, status or other legal relations are affected by a statute, municipal ordinance or franchise" to bring a declaratory judgment action. *See* Code 55-13-2. By the terms of the statute itself, an action for declaratory relief requires the joining

of "all persons * * * who have or claim any interest which would be affected by the declaration * * *." Code 55-13-11. The Act requires the presence of all essential parties, because in their absence "merits of the cause [can] not be fully and completely adjudicated." *Mainella v. Board of Trustees,* 126 W. Va. 183, 188, 27 S.E.2d 486, 489 (1943).

The appellant's members were not made parties to this proceeding. Thus, a declaration of their rights in this context would be "ineffective, unenforceable and could serve no purpose." *Town of South Charleston v. Board of Education,* 132 W. Va. 77, 84, 50 S.E.2d 880, 883 (1948). Further, claims for refunds of state taxes are specifically *excluded* from being sought in a state declaratory judgment action. Code 11-10-14(i) provides the *exclusive remedy* for refund of state taxes "in lieu of any other remedy including the Uniform Declaratory Judgment Act." *See also Chesapeake and Potomac Co. v. State Tax Department,* 161 W. Va. 77, 80-82, 239 S.E.2d 918, 920-921 (1977); *Walter Butler Building Co. v. Soto,* 142 W. Va. 616, 630, 97 S.E.2d 275, 284 (1957). Appellant's members have failed to exhaust the available administrative remedies. As a matter of state law, this action is not maintainable between these parties, and the judgment rendered would have no effect upon the appellant's members.

This litigation does not contain the essentials of an adversary proceeding, involving a real and substantial controversy. *See Old Colony Trust Co. v. Commissioner of Internal Revenue,* 279 U.S. 716, 724 (1929). The proceeding terminating in the final order below was not between truly adverse parties, *i.e.,* taxpayer and taxing authority, seeking a determination of *their* legal rights. *Muskrat v. United States.* There is no evidence in the record that valuable legal rights asserted by the appellant are threatened with imminent invasion by appellee, and will be directly affected to a specific and substantial degree by the decision below.

The appellant is not subject to, and has no duty to pay, the challenged tax and is, therefore, attempting to

secure an abstract determination by the Court of the validity of the West Virginia tax. *Muskrat v. United States, supra; Texas v. Interstate Commerce Commission,* 258 U.S. 158, 162 (1922). In other words, the appellant is seeking a determination of abstract questions or issues framed for the purpose of invoking the advice of the Court without real parties. This Court cannot deal in abstractions. Essential facts concerning each member were not made a part of the record. Commerce Clause analysis requires a "case-by-case adjudication." This Court is being asked to resolve difficult constitutional issues on nonexistent, hypothetical, or incomplete facts. *Liberty Warehouse Co. v. Grannis,* 273 U.S. 70 (1927). This Court has stated that it will not decide important constitutional questions unnecessarily or hypothetically. *City of Cincinnati v. Vester,* 281 U.S. 439, 449 (1930).

Further, this Court has refused to give advisory opinions. The refusal is based on "the implicit policies embodied in Article III, and not history alone." *Flast v. Cohen,* 392 U.S. 83 (1968). This policy recognizes the risk that comes from passing on abstract questions rather than limiting decisions to concrete cases in which a question is precisely framed by a clash of genuine adversary argument exploring every aspect of the issue. *See, e.g., United State v. Fruehauf,* 365 U.S. 146 (1961).

On the bare facts presented, this litigation is not presently ripe for summary adjudication. The Court, in abstaining from hearing this appeal at this time, will be in a far better position to decide the constitutional issues later when an aggrieved taxpayer is properly before it. In that situation, the appellee, State Tax Commissioner, at the administrative level, and the state courts, on appellate review, will have the opportunity to authoritatively construe the challenged statute as applied to a concrete set of facts. This would significantly advance this Court's ability to deal with the legal issues presented and aid in their proper resolution. This Court will exercise a sound discretion in the public interest to avoid needless friction

with state policies that may result from tentative constructions of state statutes and premature adjudication on their constitutionaliy "which may be displaced tomorrow by a state adjudication." *Railroad Commission v. Pullman Company,* 312 U.S. 496, 500 (1941). (Citations omitted.) A possible interpretation of state tax law which might render it unconstitutional, but which has not been and may never be adopted by the state taxing officials or the state courts, does not present a case. *Edelman v. Boeing Air Transport,* 289 U.S. 249, 253 (1933).

Finally, the appellant lacks standing necessary to maintain the action. Based upon the facts presented, this Court is being asked to decide an ill-defined controversy over constitutional issues, of a case which is hypothetical or abstract in character. Whether an appellant has standing to attack a state statute in this Court is a separate issue to which this Court must bring its own independent judgment. *Cramp v. Board of Public Instruction,* 368 U.S. 278, 282 (1961); *Tileston v. Ullman,* 318 U.S. 44 (1943); *Doremus v. Board of Education,* 342 U.S. 429 (1952).

The "gist of the question of standing" is whether the appellant has alleged "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions[.]" *Baker v. Carr,* 369 U.S. 186, 204 (1962). Due to the nature of a declaratory judgment action, the requirements of standing are strict. *See Griswold v. Connecticut,* 381 U.S. 479, 481 (1965).

This Court, in *Bender v. Williamsport Area School District,* 475 U.S. —, 106 S. Ct. 1326, 1331-1332, 89 L. Ed. 2d 501, 511-512 (1986), stated:

> "In such cases [when a constitutional question is presented] we have strictly adhered to the standing requirements to ensure that our deliberations will have the benefit of adversary presentation and a full development of the relevant facts. Thus, as we em-

phasized in Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982):

> '[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," [cites omitted], and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision" [cites omitted].' "

Accordingly, appellant, who is not a West Virginia taxpayer and is not affected by Code 11-15A-13, cannot be heard to complain about the hypothetical effects of the statute upon others who are not parties to this litigation. Nothing in the record demonstrates that the appellee has taken any action or plans to take action against the appellant or its members with respect to the West Virginia tax. Further, a person who lacks financial interest in taxes alleged to have been collected by the state has no legal standing to sue for their refund.

Ordinarily, a party has no standing to assert the rights of third persons. *Craig v. Boren,* 429 U.S. 190 (1976), *reh. den.,* 429 U.S. 1124 (1977). This is a "salutary 'rule of self-restraint' designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative." *Craig,* 429 U.S. at 193. (Citations omitted.) Further the "members" have an adequate, speedy, and efficient method to resolve this controversy. *See* Code 11-10-9; Code 11-10-14.

Granted, an association may have standing to assert the federal rights of its members in limited and extraordinary situations, but this case does not fall into that category. *See, e.g., N.A.A.C.P. v. Alabama,* 357 U.S. 449 (1958). Here, appellant has failed to demonstrate that

there exists a sufficient nexus between the association's activities and the rights claimed on behalf of its members.

In conclusion, this litigation does not present a case or controversy within the appellate jurisdiction of this Court. Further, the appellant has failed to demonstrate that it has the necessary standing to seek redress in this Court. No showing of personal injury was made as a result of any illegal conduct or threatened conduct of the appellee. For the foregoing reasons, this appeal should be dismissed for jurisdictional reasons.

II. THE APPELLANT FAILED TO RAISE THE ISSUE OF WHETHER THE TAX HAS BEEN PREEMPTED BY THE FEDERAL GOVERNMENT AND, THEREFORE, THIS ISSUE CANNOT BE CONSIDERED ON APPEAL BY THIS COURT.

The appellant, in its Jurisdictional Statement, raises the issue of whether, under the Supremacy Clause of the United States Constitution, the federal government has preempted the West Virginia fuel use tax by enacting a federal tax on fuel used or consumed in river transportation for the purpose of raising revenue to construct and rehabilitate navigable waterways. *See* 26 U.S.C. § 4042 (1982).

In order to obtain review of a state court decision in this Court, it must affirmatively appear from the record that a substantial federal question was presented to the state court and was passed upon by that court. *Lerner v. Casey,* 357 U.S. 468 (1958); *Coleman v. Miller,* 307 U.S. 433 (1939). An issue not presented to or considered by the state court will not be considered as an initial matter by this Court. *Carter v. Kentucky,* 450 U.S. 288, 304 (1981); *Sandstrom v. Montana,* 442 U.S. 510, 527 (1979). If nothing in the record indicates that the federal question was presented to the state court, this Court will not take judicial notice that the federal question might have been involved in the case. *Durley v. Mayo,* 351 U.S. 277, 281,

reh. den., 352 U.S. 859 (1956); *Honeyman v. Hanan*, 300 U.S. 14, 18 (1937).

The appellant failed to raise this issue in its complaint for declaratory relief. *See* Appendix B, *infra*. Further, the state court did not consider this Supremacy Clause issue in its Opinion and Final Order (J.S. App. C). Therefore, this Court should dismiss this issue for "want of a properly presented federal question." *See, e.g., Hunt v. Collins*, 457 U.S. 1127 (1982); *Doe v. Delaware*, 450 U.S. 382 (1981).

In any event, the use tax embodied in Code 11-15A-13 (hereinafter referred to as the "fuel use tax") plainly withstands scrutiny in light of federal laws. The state law is not inconsistent with the federal law, and it is possible to comply with the mandates of both federal and state law. Further, nothing in the federal legislation indicates that Congress intended to preempt all state taxation of commercial navigation.

As this Court has frequently indicated, "'[p]reemption of state law by federal statute or regulation is not favored "in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."'" *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634 (1981). (Citations omitted.) State fuel taxes on airlines and motor carriers have been routinely upheld, notwithstanding extensive federal regulation and federal fuel taxes imposed on those enterprises. Waterway transportation has been put on the same constitutional footing as other transportation enterprises. *Ott v. Mississippi Valley Barge Line Company*, 336 U.S. 169, 175 (1949). Therefore, this claim should be summarily dismissed.

III. THE TRANSPORTATION AND RELATED BUSINESS ACTIVITIES OF APPELLANT'S MEMBERS CARRIED ON WITHIN WEST VIRGINIA PROVIDE THE NEXUS NECESSARY FOR THE IMPOSITION OF WEST VIRGINIA'S NONDISCRIMINATORY, PROPERLY APPORTIONED FUEL USE TAX AND THE MEASURE OF SUCH TAX, BY VIRTUE OF ITS APPORTIONMENT FORMULA, IS INTRINSICALLY RELATED TO THE BENEFITS AFFORDED BY THE STATE.

The appellant next argues that the West Virginia tax offends the Commerce and Due Process Clauses of the United States Constitution. Several compelling reasons exist requiring dismissal of the appellant's claims or affirmance of the West Virginia court's decision.

First, the exact challenge under the Commerce Clause in this case has been previously presented to this Court in *Union Barge Line Corp. v. Hardesty, cited in Western Maryland Ry. Co. v. Goodwin,* — W. Va. —, 282 S.E.2d 240 (1981), *appeal dismissed,* 456 U.S. 952 (1982). In that case, a nondiscriminatory, properly apportioned state carrier income tax on the income of an out-of-state barge company was challenged. The taxpayer in *Union Barge* was in a position very similar to that of the appellant's members. Union Barge, a Pennsylvania-based corporation headquartered in Pittsburgh and not qualified to do business in West Virginia, was engaged in transporting freight in barges along the navigable waters of the United States. The West Virginia Supreme Court found sufficient nexus and services fairly related to the tax and upheld the tax. *Id.,* 282 S.E.2d at 251-254.

This Court dismissed the appeal for want of a substantial federal question. Therefore, the West Virginia Court's findings of substantial nexus and services fairly related to the tax of a Pittsburgh-based barge company are valid. This Court's dismissal of the *Union Barge* appeal for want of a substantial federal question should

serve as controlling precedent on the Commerce Clause issue.

Second, appellant's arguments in the instant matter are factually unsupported. These arguments are not worthy of the consideration of this Court. Appellant proved no facts in the lower court that would justify the invalidation of the West Virginia tax. A taxpayer must show that a state tax "places a burden on interstate commerce in a constitutional sense." *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 462-463 (1959). The appellant is asking this Court to resolve difficult constitutional issues on nonexistent, hypothetical, or incomplete facts. Commerce Clause analysis requires a "case-by-case" adjudication. The record is devoid of any facts regarding *individual* taxpayers. Nothing in the record minimizes the obvious nexus between West Virginia and the appellant's members; indeed, the tax is only applied on carrier operations conducted within West Virginia. The appellant has not attacked the apportionment of the West Virginia tax. Further, the appellant concedes that the West Virginia tax does not discriminate against interstate commerce "because it is equally applied to interstate as well as intrastate traffic" (J.S. 18-19). Nothing in the record suggests that the tax is not fairly related to services and protections of the state. In short, because appellant has relied on the *per se* approach of *Helson v. Kentucky,* 279 U.S. 245 (1929), it has developed no factual basis, except naked allegations, on which to declare the West Virginia tax unconstitutional as applied to its members on their delivery, use, or consumption of tangible personal property in West Virginia. *See Department of Revenue of Washington v. Association of Washington Stevedoring Companies,* 435 U.S. 734, 750-751 (1978).

Third, notwithstanding *Helson,* fuel use taxes, similar to the West Virginia tax, have been upheld even though the fuel is the motive power essential for interstate journey. *See e.g., United Air Lines v. Mahin,* 410 U.S. 623

(1973); *Edelman, supra; Nashville, supra.* This Court has recognized that interstate commerce can be "required to pay a nondiscriminatory share of the tax burden." *Braniff Airways v. Nebraska State Board of Equalization,* 347 U.S. 590, 598 (1954); *Ott, supra.*

Code 11-15A-13(a) provides that an excise tax is imposed on the delivery, use, or consumption of gasoline or special fuel in this state. Use taxes have been sustained by this Court when challenged on constitutional grounds, because use taxes are complimentary in nature to sales taxes. *Henneford v. Silas Mason Co.,* 300 U.S. 577 (1937). It is entirely proper for a state to enact a compensatory tax to neutralize or partially offset an economic advantage previously enjoyed by interstate commerce to the disadvantage of local commerce that was caused by operation of that state's taxing scheme.

This Court's most recent decisions have distilled the controlling Commerce Clause principles into a four-part test. In *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279 (1977), this Court held that a state tax is valid under the Commerce Clause if it (1) has a substantial nexus with the state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. The appellant argues that the tax in question violates the first and fourth prongs of this test.

Complete Auto "held that a State under appropriate conditions may tax directly the privilege of conducting interstate business." *Washington Stevedoring,* 435 U.S. at 745. *Complete Auto* was "a movement case which held that a state privilege tax on the business of moving goods in interstate commerce is not *per se* unconstitutional." *Id.,* 435 U.S. at 748. Absolute immunity from state taxation does not exist for interstate business because "[it] was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the

cost of doing the business." *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 254 (1938).

Complete Auto and *Washington Stevedoring,* taken together, signaled the demise of what has been called the "Formal Rule" of state taxation of interstate commerce. *See* Lockhart, *A Revolution in State Taxation of Commerce,* 65 Minn. L. Rev. 1025 (1981). The "Formal Rule" is the name given to the pre-*Complete Auto* rule in which this Court held invalid any state tax on any activity or process in interstate commerce because such tax was thought to violate the exclusive power of Congress. It is now clear that a state may, under appropriate conditions, tax interstate business. The correct analysis today focuses on the economic consequence or impact of the taxing scheme being examined. *Mobil Oil Corporation v. Vermont,* 445 U.S. 425 (1980); *Moorman Manufacturing v. Bair,* 437 U.S. 267 (1978).

While framing its argument in terms of *Complete Auto,* the appellant relies heavily on cases decided under the "Formal Rule." These cases must be reevaluated under the *Complete Auto* test, because their "Formal Rule" theoretical underpinnings have been swept away. Paying lip service to the *Complete Auto* test, the appellant bases its challenge on a line of "Formal Rule" fuel tax cases which includes *Nashville, supra; Eastern Air Transport, Inc. v. South Carolina Tax Commission,* 285 U.S. 147 (1932); *Edelman, supra;* and *United Airlines, supra.* Although the fuel tax was upheld in each of these cases, the holdings in all of these cases are predicated upon the validity of the case most heavily relied upon by the appellant, *Helson v. Kentucky, supra.*

In *Helson,* the taxpayer operated a ferry boat along the Ohio River from Kentucky to Illinois. The situs of their offices, residences and property was in Illinois. The gasoline to be taxed was purchased in Illinois. The parties stipulated that 75% of their fuel was burned in Kentucky waters during interstate journeys. The Court struck down the use tax because:

> "A tax which falls directly upon the use of one of the means by which commerce is carried on directly burdens that commerce. If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce, as this Court definitely has held, it is little more than repetition to say that such a tax cannot be laid upon the use of a medium by which such transportation is effected. * * *" *Id.*, 279 U.S. at 252.

The Court's reasoning in *Helson* is clearly a high-water mark in "Formal Rule" analysis. While *Helson* has not been explicitly overruled by this Court, it was cited with disapproval in *Commonwealth Edison*, 453 U.S. at 614-615.

The modern Commerce Clause decisions of this Court are grounded in a "practical analysis" (*Commonwealth Edison*, 453 U.S. at 616) and represent an "evolutionary process" [*Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979)] of "case-by-case [adjudication]." (*Northwestern States Portland Cement*, 358 U.S. at 457.) As a result, the Court has been compelled in recent years to overturn a number of decisions that, over the course of time, were seen to depart from sound constitutional analysis.[2] Here, decisions such as *Complete Auto* represent "more recent precedent and a new analysis [that] require rejection of [the *Helson*] reasoning." *Washington Stevedoring*, 435 U.S. at 745.) Only in this way can the Court " 'establish a consistent and rational method of inquiry' " (*Commonwealth Edison*, 453 U.S. at 615) and "bring [its] analytical framework into conformity with practical realities" (*Hughes v. Oklahoma*, 441 U.S. at 335).

In the end, *Helson v. Kentucky* has become "a derelict on the waters of the law" [*Lambert v. California*, 355 U.S.

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[2] *See, e.g., Commonwealth Edison*, 453 U.S. at 614-617, overruling *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922) (Commerce Clause); *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 743-750 (1978), overruling *Puget Sound Stevedoring Co. v. State Tax Comm'n*, 302 U.S. 90 (1937), and *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947) (Commerce Clause); *Complete Auto*, 430 U.S. at 278-289, overruling *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951) (Commerce Clause). *See also Northwestern States Portland Cement Co.*, 358 U.S. at 457-458.

225, 232 (1957) (Frankfurter, J., dissenting)] and it is out of harmony both with more recent Commerce Clause jurisprudence and with the realities of the modern transportation industry. The West Virginia tax works to equalize all intrastate and interstate carriers. Further, because of the reciprocal use tax credit and the apportionment formula, the tax does not impose multiple burdens on said commerce. A rule that has been rendered obsolete by subsequent legal and factual developments has no legitimate claim to continued application.

"The Commerce Clause does not state a prohibition; it merely grants specific power to Congress." *Washington Stevedoring,* 435 U.S. at 749. Further, "[a]ll tax burdens do not impermissibly impede interstate commerce. The Commerce Clause balance tips against the tax *only when it unfairly burdens commerce by exacting more than a just share from interstate activity.*" *Id.,* at 748. (Emphasis supplied.) The exaction in issue is not clearly excessive, and is carefully crafted to avoid multiple burdens.

Navigable waters within a state are "public highways." States are not precluded from making improvements to these "highways." Furthermore, the construction and maintenance of access roads to docking facilities greatly facilitate the commerce carried on by the appellant's members. Motor carriers in this state who exclusively use the land highways are subject to a much greater tax burden. West Virginia has a significant interest in exacting from interstate commerce its fair share of the cost of state government. *Complete Auto,* 430 U.S. at 288.

1. *Appellant's Members have Substantial Nexus with West Virginia.* The appellant attempts to attach the "local taxable event" requirement in *Edelman, Nashville,* and *United Airlines* onto the *Complete Auto's* minimal nexus requirement. However, the distinction between indirect and direct taxation of interstate commerce has been discarded and with it the "local taxable event" requirement. "Nexus" has been defined to mean a "minimal connection" or definite link between the taxing state and the person or

transaction the state seeks to tax. *National Bellas Hess, Inc. v. Illinois,* 386 U.S. 753 (1967); *Moorman Manufacturing, supra.* Here, the activity being taxed—the delivery, use, or consumption of fuel—is exactly apportioned to, and occurs entirely within West Virginia. The Court is asked to examine a properly apportioned, nondiscriminatory, complementary use tax which the appellant argues offends the Commerce Clause when applied to its activities due to insufficient nexus. This Court has repeatedly acknowledged that apportioned taxes do not offend constitutional limitations upon state interference with interstate commerce since the apportionment formula is designed to reach only income attributable to in-state activity. Thus, nexus is inherent. This Court, in *Northwestern States Portland Cement Co.,* recognized, that while unapportioned taxes by their very nature create the possibility that interstate commerce may have to pay more than its fair share, apportioned taxes by design preclude such possibility. The apportionment formula of West Virginia's fuel use tax restricts its imposition to only that portion of a taxpayer's transportation activities wholly conducted in the State and thereby avoids any improper interference with interstate commerce.

The appellant's claim that there is insufficient nexus merely because the watercraft are on their way to another state is similar to the argument made by the taxpayer in *Union Barge,* 282 S.E.2d at 251-253. Here, the factual pattern is virtually identical. If the taxpayer in *Union Barge* had nexus, so must the affected members of the appellant association.

The West Virginia Court, in *Union Barge,* found additional support in *Ott v. Mississippi Valley Barge Line, supra.* There, an *ad valorum* tax was sustained on barges moving on the Mississippi and Ohio Rivers. The critical factor in *Ott* was that the tax was apportioned exactly to the number of miles traveled in Louisiana waters. When such is the case, there is no risk of multiple taxation. As in *Ott* and *Union Barge,* the fuel use tax is apportioned ex-

actly to the number of miles traveled in West Virginia waters.

2. *The Tax is Fairly Related to the Services Provided by the State.* The appellant next argues that the fuel tax is invalid under the fourth prong of the *Complete Auto* test. Once again, the appellant, while paying lip service to the *Complete Auto* test, has applied the wrong rule. Appellant seeks to have the Court apply the rule in *Evansville-Vanderburgh Airport Authority v. Delta Airlines, Inc.,* 405 U.S. 707 (1972). In *Delta Airlines,* the Court sustained the constitutionality of per-passenger *fee* upon the enplaning of certain passengers at an airport. The fee was used to defray the cost of that particular state facility. The appellant cites that case for the proposition that "*tolls* must reflect a 'uniform, fair and practical standard' relating to public expenditures * * *." (Emphasis added.) *Id.* 404 U.S. at 716-717. "But the levy is a tax, not a toll or charge for the use of the highways." *Nashville,* 288 U.S. at 268.

There is no similarity between a user fee on a particular state-maintained facility and the West Virginia tax. The fuel use tax is a general revenue tax on the delivery, use, or consumption within West Virginia of tangible personal property purchased in another state. States, in enacting general revenue taxes, have considerable latitude. *Commonwealth Edison,* 435 U.S. at 622. The constitutionality of general revenue taxes does not depend upon a specific return or a specific governmental service. See *Nashville,* 288 U.S. at 268.

The question is not one of "value received" by a taxpayer. The mere fact that the West Virginia Legislature has chosen to dedicate the funds generated by the sales and use taxes on gasoline and special fuels to the "highway fund" is simply not a relevant or proper inquiry after *Complete Auto.* A state "'is free to pursue its own fiscal policies, unembarrassed by the Constitution.'" *Commonwealth Edison,* 453 U.S. at 625, *citing Wisconsin v. J. C. Penney Co.,* 311 U.S. 435, 444 (1940).

In *Commonwealth Edison*, the taxpayer's complaint was that "the *amount* the State receives in [severanc] taxes far exceeds the *value* of the services provided to the coal mining industry." 453 U.S. at 621. (Emphasis by the Court.) There, the Court responded that:

> "[T]here is no requirement under the Due Process Clause that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services provided to the activity. Instead, our consistent rule has been:
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> * * *
>
> > "'A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. * * * '" 453 U.S. at 622-623.

According to the Court, this latitude afforded the states under the Due Process Clause is not "somehow divested by the Commerce Clause." *Id.*, 453 U.S. at 623. The Court went on to state this test:

> "The revelant inquiry under the fourth prong of of the Complete Auto Transit test is not * * * the *amount* of the tax or the *value* of the benefits allegedly bestowed as measured by the costs the State incurs on account of the taxpayer's activities. Rather, the test is closely connected to the first prong of the Complete Auto Transit test. Under this threshold test, the interstate business must have a substantial nexus with the State before *any* tax may be levied on it. * * * Beyond that threshold requirement, the fourth prong of the Complete Auto Transit test imposes the additional limitation that the *measure* of the tax must be reasonably related to the extent of the contact * * *." 453 U.S. at 625-626 (footnotes and citation omitted; emphasis by the Court).

In *Commonwealth Edison,* this test was met. "Because it is measured as a percentage of the value of the coal taken, the Montana tax is in 'proper proportion' to [taxpayers'] activities within the State." *Id.,* 453 U.S. at 626. West Virginia's tax also manifestly passes this proportionality test. The measure of the tax is related exactly to the extent of a taxpayer's contact with West Virginia, being based upon the percentage of miles within West Virginia to total miles within and without the state.

3. *The Tax Does Not Violate the Due Process Clause.* The limitation imposed by the Due Process Clause upon state power to impose taxes upon commercial watercraft that ply the inland waters was succinctly stated in *Ott v. Mississippi Valley Barge Co.*: "So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State. * * * Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State." *Id.,* 336 U.S. at 174. (Citations omitted.)

The above language clearly establishes, with respect to the Due Process Clause, that properly apportioned state taxes are fairly related to the opportunities, benefits, or protections afforded by the taxing state. Since, in the instant case, appellant does not challenge the validity of West Virginia's fuel use tax apportionment formula, there is no genuine issue with regard to the due process test. West Virginia's use tax, by virtue of its apportionment formula, is intrinsically related to opportunities, benefits and protections afforded by the state.

The appellant argues that its members do not receive any special benefit from the use of the funds raised by the fuel use tax since the funds are dedicated to the construction and improvement of highways. However, the constitutional power to levy taxes does not depend upon the enjoyment by the taxpayer of any special benefit from the use of the funds raised by taxation. *Commonwealth Edison,* 453 U.S. at 622-623; *Nashville,* 288 U.S. at 268.

In *Nashville,* this Court upheld a fuel excise tax levied on an interstate railroad company which did not use the highways. The proceeds of such tax, like West Virginia's excise tax, were used solely in the construction and maintenance of highways. *Id.,* 288 U.S. at 268. That holding is equally applicable to watercraft plying the inland waters. There is "no practical difference so far as either the Due Process Clause or the Commerce Clause is concerned whether it is vessels or railroad cars that are moving in interstate commerce." *Ott,* 336 U.S. at 174. Therefore, this Court should summarily dismiss the appellant's Commerce and Due Process claims.

IV. THE TAX IMPOSED BY WEST VIRGINIA CODE § 11-15A-13 DOES NOT CONSTITUTE A DUTY OF TONNAGE, PROHIBITED BY ARTICLE I, SECTION 10, CLAUSE 3, OF THE UNITED STATES CONSTITUTION.

The appellant argues that the West Virginia tax, insofar as it pertains to its members, constitutes a "duty of tonnage" in violation of the United States Constitution because a barge towboat cannot navigate in West Virginia waters without being subject to the tax. Besides misconstruing the nature of the tax, appellant's argument is frivolous and does not present a substantial federal question worthy of consideration by this Court.

The "duty of tonnage" prohibition forbids a tax "upon the privilege of access by vessels or goods to the ports or to the territorial limits of a state," and applies to taxes and duties "which operate to impose a charge for the privilege of entering, trading in, or lying in a port." *Clyde Mallory Lines v. Alabama,* 296 U.S. 261, 266 (1935). This is not that sort of tax.

The fuel use tax is an apportioned, nondiscriminatory excise tax intended to complement the consumers sales tax on gasoline or special fuel. A barge towboat navigating in West Virginia waters would not be subject to the tax to the extent it paid sales tax on the fuel in West

Virginia or another state. Further, the tax is imposed on *all* motor carriers, including buses, tractor trucks, motor tractors, trucks with more than two axles, airlines, and locomotives.

Additionally, the fuel use tax applies only to barges and watercraft actually consuming or using gasoline or special fuel within this state and not to watercraft propelled by some other means, *i.e.,* current or coal-fired generator. If the tax were, in fact, a duty of tonnage, it would apply to all commercial watercraft, regardless of their mean of propulsion. Further, the tax is not related to the tonnage of the vessel. Appellant contends that the amount of fuel used or consumed by watercraft in West Virginia increases as the size and weight of the boat increases. For two boats operating in a vacuum, this is true, but this has no bearing on the constitutional validity of the West Virginia tax. For instance, a large towboat pushing four empty barges downstream at five knots would consume considerably less fuel than a medium-sized towboat pushing four coal-laden barges upstream at the same speed. Additionally, a properly tuned engine would consume less fuel than an engine in need of adjustment.

West Virginia's fuel use tax is simply not a "duty of tonnage" in the constitutional sense of that term. Here there is no duty or charge on the entry into a port of this state or right of navigation on West Virginia waters. Despite the broad language cited by the appellant from *Clyde Mallory Lines,* that "the prohibition against tonnage duties has been deemed to embrace all taxes and duties regardless of their name or form," the tonnage duty prohibition does not exempt watercraft from all state tax burdens. *See, e.g., Huse v. Glover,* 119 U.S. 543 (1886); *Ott, supra; Transportation Co. v. City of Parkersburg,* 107 U.S. 691 (1883).

Appellant further contends that the dispositive factors in each case addressed by this Court is the presence or absence of an identifiable "quid pro quo" for which

the state is justified in demanding compensation. However, as discussed previously, this test is only applied when a toll or charge is made on a specific government facility. The West Virginia tax is not in conflict with the duty of tonnage prohibition.

V. THE FUEL USE TAX IS NOT A CHARGE OR TOLL ON THE USE OF NAVIGABLE WATERS LYING IN WEST VIRGINIA, AND IS NOT PROHIBITED BY EITHER THE NORTHWEST ORDINANCE OR THE VIRGINIA COMPACT.

The appellant argues that the fuel use tax is invalidated by a pair of eighteenth-century compacts: the Northwest Ordinance of 1787 and the Virginia Compact of 1789. Appellant contends that the language regarding the freedom of the subject navigable waterways requires that the fuel use tax be invalidated. Claims that the Northwest Ordinance prohibited all charges or taxes have been routinely rejected by the courts. Appellant's claim should be summarily rejected by this Court for want of a substantial federal question.

The West Virginia Supreme Court of Appeals has held that the Northwest Ordinance and the Virginia Compact were superceded by the adoption of the United States Constitution and that these territorial compacts do not limit West Virginia's sovereignty. *American Barge Line v. Koontz,* 136 W. Va. 747, 68 S.E.2d 56 (1951). The West Virginia court further held that neither could limit the levy or collection of a state carrier income tax on barge companies. In so holding, the West Virginia court cited and relied upon *Economy Light & Power Company v. United States,* 256 U.S. 113 (1921). The appellant claims that the West Virginia decision failed to recognize the full impact of *Economy Light.* However, this is not the case.

The State of West Virginia was admitted to the Union by an Act of Congress, passed December 31, 1862, which conditionally admitted this State "into the Union on an

equal footing with the original States in all respects whatever * * *." *American Barge Line,* 136 W. Va. at 757, 68 S.E.2d at 62. In *Economy Light,* Justice Pitney, in referring to several cases on the subject of the Northwest Ordinance, holding its provisions would not control the authority and powers of the state after her admission, stated:

> "[A] state formed out of a part of the Northwest Territory has the same power to regulate navigable waters within its borders that is possessed by other states of the Union; *that is to say, until Congress intervenes, the power of the state, locally exerted, is plenary;* nevertheless, where the navigation serves commerce among the states or with foreign nations, Congress has the supreme power when it chooses to act, and is not prevented, by anything the states may have done from assuming entire control of the matter." 256 U.S. at 120. (Emphasis added.)

Further, the term "forever free" does not mean without charge. Rather, it refers to the accessibility of navigable waters without discrimination. *Indiana Port Commission v. Bethlehem Steel Corp.,* 534 F. Supp. 858 (1981). In *Indiana Port Commission,* the court addressed a challenge under the Northwest Ordinance's prohibition on "taxes, imposts or duties" to a harbor service charge imposed on watercraft using the Burns Water Harbor. The court also noted that objections that the Northwest Ordinance prohibited all charges or taxes have been expressly rejected by the courts. *See, e.g., Huse v. Glover, supra; Sands v. Manistee River Improvement Company,* 123 U.S. 288 (1887).

In any event, if the appellant is correct in its expansive reading of *Economy Light,* and the sovereignty of West Virginia is impaired by the Northwest Ordinance, and that it was not superceded by the adoption of the Constitution of the United States, it still does not invalidate the fuel use tax. The West Virginia tax is not a "tax,

duty or impost'' prohibited by the Northwest Ordinance. This document proclaiming freedom on navigable rivers contemplates, like the ''duty of tonnage,'' a toll or charge on the right of navigation. As previously noted, the fuel use tax is not such a toll or a charge.

The issue with respect to the Virginia Compact, a statute enacted by the Commonwealth of Virginia approximately 74 years before West Virginia was admitted into the Union, does not present a federal question because it is not a case arising under the Constitution, treaties, or laws of the United States. 28 U.S.C. § 1257(2). As a matter of state law, ''West Virginia is not limited in her sovereignty by the enactment of [the Virginia Compact] * * * before the West Virginia was admitted into the Union by the Congress of the United States of America and thereby placed on an equal footing with other states 'in all respects whatever.' '' *American Barge,* 136 W. Va. at 758, 68 S.E.2d at 62. Therefore, with respect to the Virginia Compact, the judgment of the West Virginia court rests upon an adequate nonfederal basis.

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CONCLUSION

The appeal should be dismissed, or, in the alternative, the judgment of the Circuit Court of Kanawha County, West Virginia, with respect to the holding that the statute is constitutional and valid in every respect, should be affirmed.

Respectfully submitted,

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APPENDICES

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APPENDIX A

OTHER RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, Section 1, of the United States Constitution provides:

> "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

Article III, Section 2, Clause 1, of the United States Constitution, in pertinent part, provides:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority * * *."

W. Va. Code § 11-10-10 (1986), in pertinent part, provides:

> "When a petition for reassessment provided for in section eight [§ 11-10-8] of this article, or a petition for refund or credit provided for in section fourteen [§ 11-10-14] of this article, is filed within the time prescribed by said sections for such filing, or a hearing is requested pursuant to the provisions of any other article of this chapter which is administered under this article, the tax commissioner shall assign a time and place for a hearing upon the same and shall notify the petitioner of such hearing by written notice at least twenty days in advance thereof. Such hearing shall be held within ninety days from the date of filing the petition or other written request for hearing

unless continued by agreement of the parties or by the tax commissioner for good cause.

"The hearing shall be informal and shall be conducted in an impartial manner by the tax commissioner or a hearing examiner designated by him. If the hearing is on a petition for reassessment the burden of proof shall be upon the taxpayer to show the assessment is incorrect and contrary to law, either in whole or in part. If the hearing is on a petition for refund or credit, the petitioner shall also have the burden of proof.

"After any hearing as above provided for, the tax commissioner shall, within a reasonable time, give notice in writing of his decision. Unless an appeal from the decision of the tax commissioner rendered in any such hearing is taken, pursuant to the provisions of section ten [§ 11-10-10] of this article, within sixty days after service of such notice, the tax commissioner's decision shall become final and conclusive and not subject to either administrative or judicial review. The amount, if any, due the State under such decision shall be due and payable on the day following the date upon which such decision becomes final. The amount, if any, due the taxpayer under such decision shall be promptly refunded, or the same may be credited pursuant to section fourteen of this article."

W. Va. Code § 11-10-10 (1986), in pertinent part, provides:

"(a) *Right of appeal.*—A taxpayer may appeal the administrative decision of the tax commissioner issued under section nine or fourteen [§ 11-10-9 or § 11-10-14] of this article, by taking an appeal to the circuit courts of this state within sixty days after being served with notice of the administrative decision.

* * *

"(e) *Hearing of appeal.*—The court shall hear the appeal and determine anew all questions submitted to it on appeal from the determination of the tax

commissioner. In such appeal a certified copy of the tax commissioner's notice of assessment or amended or supplemental assessment and administrative decision thereon shall be admissible and shall constitute prima facie evidence of the tax due under the provisions of those articles of this chapter to which this article is applicable. The court shall render its decree thereon and a certified copy of said decree shall be filed by the clerk of the court with the tax commissioner who shall then correct the assessment in accordance with the decree. An appeal may be taken by the taxpayer or the tax commissioner to the supreme court of appeals of this state."

W. Va. Code § 11-10-14, in pertinent part, provides:

"(a) *Refunds or credits of overpayments.*—In the case of overpayment of any tax, additions to tax, penalties or interest imposed by this article or any of the other articles of this chapter to which this article is applicable, the tax commissioner shall, subject to the provisions of this article, refund to the taxpayer the amount of the overpayment or, if the taxpayer so elects, apply the same as a credit against the taxpayer's liability for such tax for other periods. The refund or credit shall include any interest due the taxpayer under the provisions of section seventeen [§ 11-10-17] of this article.

* * *

"(c) *Claims for refund or credit.*—No refund or credit shall be made unless the taxpayer has timely filed a claim for refund or credit with the tax commissioner. A person against whom an assessment or an administrative decision has become final shall not be entitled to file a claim for refund or credit with the tax commissioner as prescribed herein. The tax commissioner shall determine the taxpayer's claim and notify the taxpayer in writing of his determination.

"(d) *Petition for refund or credit; hearing.*—If the taxpayer is not satisfied with the tax commis-

sioner's determination of his claim for refund or credit, or if the tax commissioner has not determined the taxpayer's claim within ninety days after such claim was filed, or six months in the case of claims for refund or credit of the taxes imposed by articles twenty-one and twenty-four [§§ 11-21-1 et seq. and 11-24-1 et seq.] of this chapter, after the filing thereof, the taxpayer may file with the tax commissioner, either personally or by certified mail, a petition for refund or credit: Provided, that no petition for refund or credit may be filed more than sixty days after the taxpayer is served with notice of denial of his claim. The petition for refund or credit shall be in writing, verified under oath by said taxpayer or his duly authorized agent having knowledge of the facts, and shall set forth with particularity the items of the determination objected to, together with the reasons for the objections. When a petition for refund or credit is properly filed, the procedures for hearing and for decision prescribed in section nine [§ 11-10-9] shall be followed.

"(e) *Appeal.*—An appeal from the tax commissioner's decision upon the petition for refund or credit may be taken by the taxpayer in the same manner and under the same procedure as that set forth in section eleven [§ 11-10-11] relating to an appeal from the tax commissioner's decision on a petition for reassessment, but no bond shall be required of the taxpayer.

"(f) *Decision of the court.*—Where the appeal is to review an administrative decision on a petition for refund or credit, the court may determine the legal rights of the parties but in no event shall it enter a judgment for money.

* * *

"(i) *Remedy exclusive.*—The procedure provided by this section shall constitute the sole method of obtaining any refund or any credit, it being the intent hereof that the procedure set forth in this article shall

be in lieu of any other remedy, including the uniform declaratory judgments act embodied in article thirteen [§ 55-13-1 et seq.], chapter fifty-five of this Code and the provisions of section two-a [§ 11-1-2a], article one of this chapter.

"(j) *Applicability of this section.*—The provisions of this section shall apply to refunds or credits of any tax, additions to tax, penalties or interest imposed by any article of this chapter to which this article is applicable, for any refund or credit sought after the first day of July, one thousand nine hundred seventy-eight, irrespective of whether the claim of refund or credit is for a tax period ending prior to that date."

Former W. Va. Code § 11-10A-8(a) (1981) provided:

"(a) *Use tax credit.*—Each purchaser liable for a use tax on tangible personal property shall be entitled to full credit for the combined amount or amounts of legally imposed sales or use taxes paid by him with respect to the same property to another state and any subdivision thereof. The credit shall be applied first against the amount of any use tax due the state, and any unused portion of the credit shall then be applied against the amount of any use tax due a subdivision."

W. Va. Code § 55-13-1 provides:

"Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree."

W. Va. Code § 55-13-2 provides:

"Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder."

W. Va. Code § 55-13-9 provides:

"When a proceeding under this article involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending."

W. Va. Code § 55-13-11 provides:

"When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general of the State shall also be served with a copy of the proceeding and be entitled to be heard."

W. Va. Code § 55-13-13 provides:

"The word 'person,' wherever used in this article, shall be construed to mean any person, partnership, joint-stock company, unincorporated association or society, or municipal or other corporation of any character whatsoever."

W. Va. Code § 55-13-15 provides:

"This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees."

W. Va. Code § 55-13-16 provides:

"This article may be cited as the 'Uniform Declaratory Judgments Act.' "

APPENDIX B

IN THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA

WATERWAYS ASSOCIATION
OF PITTSBURGH, a
Pennsylvania corporation,

Plaintiff,

v. CIVIL ACTION NO. 84-C-2814

HERSCHEL H. ROSE, III, Tax
Commissioner of the
State of West Virginia,

Defendant.

COMPLAINT FOR DECLARATORY RELIEF

1. This is a Complaint for a declaratory judgment filed pursuant to the provisions of Chapter 55, Article 13, Section 1, *et seq.* of the Code of West Virginia of 1931, as amended, ("West Virginia Code") and the provisions of Rule 57 of the West Virginia Rules of Civil Procedure.

2. Plaintiff is Waterways Association of Pittsburgh, a nonprofit membership association incorporated under the laws of the State of Pennsylvania.

3. Defendant, Herschel H. Rose, III ("Rose" or "State Tax Commissioner"), is the Tax Commissioner of the State of West Virginia, having been duly appointed to such office as required by the Constitution and laws of the State of West Virginia.

3. [sic] On February 18, 1983, the West Virginia Legislature passed House Bill 1657, amending Articles 14, 14A, 15 and 15A of Chapter 11 of the West Virginia Code

(hereinafter sometimes referred to as "House Bill 1657"). House Bill 1657 became effective April 1, 1983, and provides for imposition of a tax on the sale, use or consumption in West Virginia of gasoline or special fuel.

4. West Virginia Code § 11-15A-13(a)(2) imposes an excise tax on the "use or consumption in this State of gasoline or special fuel purchased outside this State at the rate of 5% of the average wholesale price of such gasoline or special fuel."

5. West Virginia Code § 11-15A-13(c)(1) delegates to the State Tax Commissioner the authority to "determine the average wholesale price of gasoline and special fuel for each annual period, on the basis of sales data gathered for the preceding period of the first day of July through the thirty-first day of October."

6. West Virginia Code § 11-15A-13(c)(2) provides that the "average wholesale price" shall mean the statewide average per gallon wholesale price "as determined by the Tax Commissioner from information furnished by distributors of gasoline and special fuel in this State or such other information regarding wholesale selling prices as the tax commissioner may gather, or a combination of such information...."

7. West Virginia Code § 11-15A-13(d) states:

> (d) *Computation of Tax Due from Motor Carriers.*—Every person who operates or causes to be operated a motor carrier in this State shall pay the tax imposed by this section of the average wholesale price of all gallons of gasoline or special fuel used in the operation of any motor carrier within this State, under the following rules:

(1) The total amount of gasoline or special fuel used in the operation of the motor carrier within this State shall be that proportion of the total amount of gasoline and special fuel used in any motor carrier's operations within and without this State, that the total number of miles traveled within this State bears to the total number of miles traveled within and without this State.

(2) A motor carrier shall first determine the gross amount of tax due under this section on the average wholesale value, determined under subsection (c), of all gasoline and special fuel used in the operation of the motor carrier within this State during the preceding quarter, as if all gasoline and special fuel had been purchased outside this State.

(3) Next, the taxpayer shall determine the total tax paid under article fifteen of this chapter on all gasoline and special fuel purchased in this State for use in the operation of the motor carrier.

(4) The difference between (2) and (3) is the amount of tax due under this article when (2) is greater than (3), or the amount to be refunded or credited to the motor carrier when (3) is greater than (2), which refund or credit shall be allowed in the same manner and under the same conditions as a refund or credit is allowed for the tax imposed by article fourteen-A of this chapter.

8. West Virginia Code § 11-15-18(c)(6) defines "motor carrier" to include "any aircraft, barge or other watercraft or locomotive transporting passengers or freight in or through this State."

9. Some of plaintiff's members are motor carriers within the meaning of West Virginia Code § 11-15-18(c)(6) and are in the business of transporting products by barge and other watercraft in interstate commerce on those

parts of the Ohio River that are in the State of West Virginia, on other navigable rivers of the State, and on the Ohio River and other navigable rivers outside West Virginia.

10. Certain of plaintiff's members operating in West Virginia have filed returns required under the provisions of House Bill 1657 and paid the tax on fuel used in their river transportation business in West Virginia even though they believe such tax to be invalid.

11. The State Tax Commissioner is empowered by House Bill 1657 and by the provisions of Chapter 11 of the West Virginia Code to administer and enforce the tax imposed by said legislation.

COUNT I

12. The tax imposed by House Bill 1657 is a direct burden upon an instrumentality of interstate commerce in violation of Article I, Section 8, Clause 3 of the United States Constitution (the "Commerce Clause").

WHEREFORE, plaintiff Waterways Association of Pittsburgh requests that this Court determine that the tax imposed by House Bill 1657 is unconstitutional, and without effect and that the Court enter an Order declaring the said tax to be invalid and unenforceable against plaintiff's members and all others similiarly affected and directing defendant State Tax Commissioner to refund to plaintiff's members all taxes paid under the provisions of said House Bill 1657 on fuel used in their river transportation business in West Virginia.

COUNT II

As an alternative to the relief sought in Count I of the Complaint, plaintiff avers:

13. The taxes paid by plaintiff's members as required by West Virginia Code § 11-15A-13 do not bear any fair relationship to the benefits they receive, if any, from the State of West Virginia.

14. The tax imposed by House Bill 1657 is an unconstitutional burden on interstate commerce in violation of the Commerce Clause and Amendment XIV, Section 1 of the United States Constitution (the "Due Process Clause") because the tax is not fairly related to services provided to plaintiff's members by the State of West Virginia.

WHEREFORE, plaintiff Waterways Association of Pittsburgh requests that this Court determine that West Virginia Code §§ 11-15-18 and 11-15A-13 are unconstitutional and without effect and that the Court enter an Order declaring the same to be invalid and unenforceable against plaintiff's members and all others similarly affected and directing defendant State Tax Commissioner to refund to plaintiff's members all taxes paid under the provisions of said House Bill 1657 on fuel used in their river transportation business in West Virginia.

COUNT III

As an alternative to the relief sought in Counts I and II of the Complaint, plaintiff avers:

15. The tax imposed by West Virginia Code § 11-15A-13 discriminates against interstate commerce in vio-

lation of Commerce Clause and Due Process Clause of the United States Constitution because it allows a credit against the tax with respect to tax paid on fuel purchased in this State but allows no similar credit for tax that is or could be imposed by other jurisdictions on fuel purchased outside this State.

WHEREFORE, plaintiff Waterways Association of Pittsburgh requests that this Court determine that West Virginia Code § 11-15A-13 is unconstitutional and without effect and that the Court enter an Order declaring the same to be invalid and unenforceable against plaintiff's members and all others similiarly affected and directing defendant State Tax Commissioner to refund to plaintiff's members all taxes paid under the provisions of said House Bill 1657 on fuel used in their river transportation business in West Virginia.

COUNT IV

As an alternative to the relief sought in Counts I, II, and III of the Complaint, plaintiff avers:

16. West Virginia Code § 11-15A-13(c)(2) provides that the "average wholesale price" that is the basis for the tax imposed by West Virginia Code § 11-15A-13 is calculated from data supplied by distributors of gasoline and diesel fuel.

17. Plaintiff's members use a less expensive fuel in their operations than the fuel used as the basis for the Tax Commissioner's calculation of the average wholesale price that is, in turn, the basis for calculating the tax.

18. West Virginia Code § 11-15A-13(c)(2) discriminates without rational basis against plaintiff's members

in violation of the equal and uniform taxation requirements of Article X, Section 1 of the West Virginia Constitution because it requires plaintiff's members to pay a tax based on a higher, more expensive grade of fuel than plaintiff's members use in their operations.

WHEREFORE, plaintiff Waterways Association of Pittsburgh requests that this Court determine that West Virginia Code § 11-15A-13(c)(2) is unconstitutional and without effect and that the Court enter an Order declaring the same to be invalid and unenforceable against plaintiff's members and all others similiarly affected and directing defendant State Tax Commissioner to refund to plaintiff's members all taxes paid under the provisions of said House Hill 1657 on fuel used in their river transportation business in West Virginia.

COUNT V

As an alternative to the relief sought in Counts I, II, III and IV of the Complaint, plaintiff avers:

19. The delegation of authority to the State Tax Commissioner contained in West Virginia Code § 11-15A-13 to determine the average wholesale price of gasoline on the basis of "information furnished by distributors of gasoline or special fuel in this state, or such other information regarding wholesale prices as the tax commissioner may gather, or a combination of such information" is an unlawful delegation of the taxing power of the Legislature of the State of West Virginia and in violation of Article V, Section 1 of the West Virginia Constitution.

WHEREFORE, plaintiff Waterways Association of Pittsburgh requests that this Court determine that West Virginia Code §§ 11-15-18 and 11-15A-13 are unconstitutional and without effect and that the Court enter an Order declaring the same to be invalid and unenforceable against plaintiff's members and all others similarly affected and directing defendant State Tax Commissioner to refund to plaintiff's members all taxes paid under the provisions of said House Bill 1657 on fuel used in their river transportation business in West Virginia.

COUNT VI

As an alternative to the relief sought in Counts I, II, III, IV and V of the Complaint, plaintiff avers:

20. The tax imposed by House Bill 1657 passed by the Legislature of West Virginia and administered by Rose is prohibited by Article I, Section 10 of the United States Constitution and is therefore illegal and without effect because it imposes a charge on watercraft operating on the navigable waters of the State of West Virginia without any corresponding benefit and as such constitutes an unlawful Duty of Tonnage.

WHEREFORE, plaintiff Waterways Association of Pittsburgh requests that this Court determine that West Virginia Code §§ 11-15-18 and 11-15A-13 impose a tax prohibited by the United States Constitution and are therefore unconstitutional and without effect and that the Court enter an Order declaring the same to be invalid and unenforceable against plaintiff's members and all

others similarly affected and directing defendant State Tax Commissioner to refund to plaintiff's members all taxes paid under the provisions of said House Bill 1657 on fuel used in their river transportation business in West Virginia.

COUNT VII

As an alternative to the relief sought in Counts I, II, III, IV, V and VI of the Complaint, plaintiff avers:

21. The tax imposed by House Bill 1657 passed by the Legislature of West Virginia and administered by Rose violates the spirit and terms of the Northwest Ordinance and Virginia Compact and is therefore illegal and without effect because it is contrary to provisions in those documents which declare that all navigable waters leading into the Mississippi River, including the Ohio River, shall be "forever free."

WHEREFORE, plaintiff Waterways Association of Pittsburgh requests that this Court determine that West Virginia Code §§ 11-15-18 and 11-15A-13 impose a tax prohibited by the Northwest Ordinance and the Virginia Compact and are therefore without effect and that the Court enter an Order declaring the same to be invalid and unenforceable against plaintiff's members and all others similarly affected and directing defendant State Tax Commissioner to refund to plaintiff's members all taxes paid under the provisions of said House Bill 1657 on fuel

used in their river transportation business in West Virginia.

WATERWAYS ASSOCIATION
OF PITTSBURGH

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APPENDIX C

IN THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA

WATERWAYS ASSOCIATION
OF PITTSBURGH, a
Pennsylvania corporation,

Plaintiff,

v. CIVIL ACTION NO. 84-C-2814

HERSCHEL H. ROSE, III, Tax
Commissioner of the
State of West Virginia,

Defendant.

ANSWER OF THE DEFENDANT STATE TAX
COMMISSIONER OF WEST VIRGINIA

First Defense

1. Defendant State Tax Commissioner admits the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, and 11 of the complaint.

2. Defendant State Tax Commissioner is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 10 of the Complaint, for the reason that the defendant has no knowledge as to the identity of the members of the plaintiff association and therefore is unable to either admit or deny such allegations.

3. The defendant State Tax Commissioner denies the allegations contained in Count I, Paragraph 2 of the complaint. The defendant further asserts that the tax imposed by West Virginia Code § 11-15A-13(a) does not vi-

olate Article 1, Section 8, Clause 3 of the Constitution of the United States (the Commerce Clause); that such tax is fairly apportioned under the statutory formula set out in West Virginia Code § 11-15A-13(d); that the plaintiffs have a substantial nexus with the State of West Virginia; and that the tax imposed by West Virginia Code § 11-15A-13(a) is fairly related to the services provided by the State of West Virginia.

4. The defendant State Tax Commissioner denies the allegations contained in Paragraphs 13 and 14, Count II, of the complaint.

5. The defendant State Tax Commissioner denies the allegations contained in Paragraph 15, Count III, of the complaint, and further asserts that the provisions of Chapter 11, Article 10A of the West Virginia Code (the Multi-State Tax Compact) and more specifically W. Va. Code § 11-10A-8(a) provides a credit with respect to fuel purchased in another state.

6. The defendant State Tax Commissioner admits the allegations contained in Paragraph 16, Count IV of the complaint.

7. The defendant State Tax Commissioner is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 17, Count IV of the complaint and therefore neither admits nor denies such allegations, but demands strict proof thereof.

8. The defendant State Tax Commissioner denies the allegations contained in Paragraph 18, Count IV of the complaint.

9. The defendant State Tax Commissioner denies the allegations contained in Paragraph 19, Count V of the complaint.

10. The defendant State Tax Commissioner of West Virginia denies the allegations contained in Paragraph 20, Count VI, of the complaint.

11. The defendant State Tax Commissioner denies the allegations contained in Paragraph 21, Count VII, of the complaint.

Second Defense

12. The complaint fails to state a claim upon which relief can be granted.

Third Defense

13. The relief for which the plaintiffs pray in Counts I, II, III, IV, V, VI, and VII of the complaint, specifically, refund of all taxes paid by the plaintiffs' members pursuant to W. Va. Code § 11-15A-13(a) and House Bill 1657 is absolutely unavailable under the provisions of Chapter 11, Article 10, of the West Virginia Code. § 11-10-14 sets out the procedures under which must be followed to obtain a refund of state tax, 11-10-14(i) is as follows:

> "(i) Remedy exclusive—The procedure provided by this section shall constitute the sole method of obtaining any refund or any credit, it being the intent hereof that the procedure set forth in this article shall be in lieu of any other remedy, *including the uniform declaratory judgments act embodied in article thirteen* [§ *55-13-1 et seq.*], *chapter fifty-five of this Code* and the provisions of section two-a [§ 11-1-2a], article one of this chapter." (Emphasis Added)

WHEREFORE, defendant State Tax Commissioner of West Virginia demands judgment:

(a) Dismissing in all respect the plaintiff's complaint; and,

(b) Awarding the defendants his costs in this action and such other and further relief as the Court may deem just and proper.

HERSCHEL H. ROSE, III
State Tax Commissioner,
State of West Virginia

By Counsel

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